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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NATIONAL CENTER FOR PUBLIC POLICY RESEARCH,

Plaintiff,

V.

HOWARD SCHULTZ, STARBUCKS CORPORATION, KEVIN JOHNSON, JOHN CULVER, RACHEL RUGGERI, TED ADAMS, TYSON AVERY, KELLY BENGSTON, BRADY BREWER, DENNIS BROCKMAN, GEORGE DOWDIE, JEN FRISCH, SHANNON GARCIA, RACHEL GONZALEZ, ZABRINA JENKINS, A.J. JONES, II, SARA KELLY, JENNIFER KRAFT, ANGELA LIS, CARL MOUNT, DENISE NELSEN, ANJU RAO, KYNDRA RUSSELL, DEBBIE STROUD, ROSANN WILLIAMS, GINA WOODS, MELLODY HOBSON, RICHARD E. ALLISON, JR., ANDREW CAMPION, MARY N. DILLON, ISABEL GE MAHE, JORGEN VIG KNUDSTORP, SATYA NADELLA, JOSHUA COOPER RAMO, CLARA SHIH, AND JAVIER G. TERUEL,

Defendants.

Case No. 2:22-CV-00267-SAB

**INDIVIDUAL DEFENDANTS'
REPLY IN SUPPORT OF
MOTION TO DISMISS
COMPLAINT**

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INTRODUCTION

2 Plaintiff's Response ("Response" or "Resp.") to the Individual Defendants'
3 Motion to Dismiss, ECF No. 27, concedes that many of the Complaint's allegations
4 are insufficiently pled and offers to file an amended complaint. Resp. at 1-3, 19.¹
5 The Court could grant the Motion on this basis alone. Regardless, the Response does
6 not overcome *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011), where the
7 Supreme Court made clear that Plaintiff—a non-employee shareholder of
8 Starbucks—cannot assert a Title VII claim. Nor does the Response demonstrate any
9 justiciable controversy. Claims I-IV should be dismissed with prejudice as these
10 deficiencies cannot be cured through amendment.

11 The Response similarly fails to revive Counts V-VIII as Plaintiff continues to
12 assert, in conclusory fashion, that the Initiatives are *per se* illegal and the Board
13 “knew or should have known” it. Resp. at 15. Neither the Complaint’s allegations
14 nor Plaintiff’s authority support this proposition. Rather, the implementation of the
15 Initiatives and the Board’s refusal of the Demand are both protected by the business
16 judgment rule. The Complaint also fails to plead the Individual Defendants’
17 participation in the adoption of the Initiatives or a non-exculpated claim.

19 ¹ Plaintiff states that if it files an amended complaint, the Court should “allow”
20 the case to “move forward into discovery.” Resp. at 1. For the avoidance of doubt,
the Individual Defendants contend that any amendment would not avoid dismissal
and reserve their right to challenge the sufficiency of any amended pleading.

LEGAL STANDARDS

2 Plaintiff incorrectly posits that the Court should treat the Motion as “one
3 pursuant to Rule 12(e)[.]” Resp. at 3. The Individual Defendants do not move under
4 that rule, but under Rules 12(b)(6) and 23.1. Individual Defendants’ Motion to
5 Dismiss, ECF No. 20 (“Motion” or “Mot.”) at 1. To survive a Rule 12(b)(6) motion,
6 the Complaint “must contain sufficient factual matter, accepted as true, to ‘state a
7 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
8 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Conclusory
9 statements, particularly legal conclusions, are “not entitled to the assumption of
10 truth,” *Iqbal*, 556 U.S. at 679, and allegations must do more than create “a suspicion
11 [of] a legally cognizable right of action,” *Twombly*, 550 U.S. at 555. Rule 23.1(b)(3)
12 requires Plaintiff to plead with “particularity” any effort to obtain the desired
13 corporate action and the reasons it was not obtained. Plaintiff’s Complaint fails to
14 satisfy either standard.

ARGUMENT

I. Plaintiff Cannot Invoke the Uniform Declaratory Judgments Act Because It Lacks Standing and a Justiciable Controversy, Requiring Dismissal of Counts I-IV

A. Plaintiff Lacks Standing to Seek a Declaratory Judgment

Counts I-IV seek declaratory judgments under the Washington Declaratory Judgments Act. Counts I-IV must be dismissed for lack of standing and/or lack of a justiciable controversy.

1 First, Plaintiff is not within the “zone of interests to be protected” under Title
 2 VII, 42 U.S.C. § 1981, or state civil rights laws. Mot. at 5 (citing *Thompson*, 562
 3 U.S. at 176–77 (“absurd” to permit shareholder to “sue a company for firing a
 4 valuable employee for racially discriminatory reasons, so long as he could show that
 5 the value of his stock decreased as a consequence.”)). Tellingly, Plaintiff’s only
 6 argument to distance itself from *Thompson* is to argue that its clear and definite
 7 language is “dicta.” Resp. at 5. But federal courts nationwide have relied on this very
 8 language in determining the scope of Title VII and related statutes. *See, e.g., Simmons*
 9 *v. UBS Fin. Servs., Inc.*, 972 F.3d 664, 668-69, 671 (5th Cir. 2020) (the “[Supreme]
 10 Court considered it ridiculous that the shareholder might be able to maintain such a
 11 suit” and holding that Title VII “does not—even arguably—protect nonemployees
 12 from mistreatment by someone else’s employer” and observing that it “would be a
 13 remarkable extension of *Thompson*—and of Title VII generally—to rule that a
 14 nonemployee has the right to sue.”); *Ray v. Muncie Cnty. Sch. Corp.*, 2018 WL
 15 4680217, at *3 (S.D. Ind. Sept. 28, 2018) (applying *Thompson* and dismissing Title
 16 VII claim for lack of standing); *FCS Advisors, LLC v. Missouri*, 2017 WL 4639026,
 17 at *6 (W.D. Mo. Oct. 16, 2017), *aff’d*, 929 F.3d 618 (8th Cir. 2019) (similar); *Bank*
 18 *of Am. Corp. v. City of Miami*, 581 U.S. 189, 199 (2017) (reiterating that *Thompson*
 19 “reasoned that [a broader] interpretation [of Title VII] would produce farfetched
 20 results, for example, a shareholder in a company could bring a Title VII suit against

1 the company for discriminatorily firing an employee.”). This Court should do the
 2 same.

3 *Second*, as if doubling down on its lack of standing to bring its claim for
 4 declaratory judgments will somehow sidestep the problem, Plaintiff admits it has not
 5 suffered any injury from the Initiatives. Resp. at 3-4 (not asserting the “same
 6 personalized grievance claims” that Starbucks employees would assert); *id.* at 4
 7 (“The Plaintiff challenges *no* particular hiring or promotional decision[,]” and “seeks
 8 to recover *no* backpay”). Instead, Plaintiff argues that it is only challenging the
 9 “legality of the corporate policies themselves” and brings the claims “only as a
 10 predicate for its claims for injunctive relief[.]” *Id.* at 4, 6. This fails to establish harm
 11 that is both “substantial” and “personal to the party[.]” *Amalgamated Transit Union*
 12 *Local No. 1576 v. Snohomish Cnty. Pub. Transp. Ben. Area*, 178 Wash. App. 566,
 13 572, 316 P.3d 1103 (2013); *Nat'l Union Fire Ins. Co. of Pittsburgh, v. Nw. Youth*
 14 *Servs.*, 97 Wash. App. 226, 234, 983 P.2d 1144 (1999) (affirming denial of
 15 declaratory judgment action as to insurer’s obligations because plaintiff was not
 16 covered by the insurance contract and lacked standing); *see also City of Reno v.*
 17 *Netflix, Inc.*, 52 F.4th 874, 878 (9th Cir. 2022) (federal declaratory judgment act
 18 “does not provide a cause of action when a party . . . lacks a cause of action under a
 19 separate statute and seeks to use the Act to obtain affirmative relief.”). According to
 20 Plaintiff, so long as their violation is just a “predicate,” standing is not required.

1 Resp. at 6. Not so. This concedes that Plaintiff is improperly seeking declaratory
 2 relief that the Initiatives generally “violate American employment law.” *Id.* at 4.

3 Plaintiff argues that *Thompson* does not require the dismissal of Counts I and
 4 III because they do not assert violations of Title VII, but instead violations of 42
 5 U.S.C. § 1981 and certain state non-discrimination laws. Resp. at 4-5. This, of
 6 course, ignores that Plaintiff necessarily seeks declaratory judgments for both counts
 7 under the UDJA or the federal Declaratory Judgments Act, and must therefore
 8 satisfy the same “zone of interests” and “injury in fact” analysis as Count II. Plaintiff
 9 provides no authority that a shareholder is within the zones of interest of any of these
 10 statutes or that Plaintiff has suffered any injury in fact. As for Count IV, an exposure
 11 to material liabilities, it is predicated on a violation of these statutes. Resp. at 5.
 12 Without an underlying violation, there is no liability.

13 **B. Plaintiff Fails to Plead a Justiciable Controversy to Seek a
 14 Declaratory Judgment**

15 The Complaint also fails to plead a justiciable controversy required to seek a
 16 declaratory judgment. Mot. at 6-9. Plaintiff identifies no “actual, present, and
 17 existing dispute or even the mature seeds of such a dispute,” *id.* at 6-7 (citing
 18 *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*,
 19 141 Wash. 2d 245, 284, 4 P.3d 808 (2000)), and instead theorizes that “potential”
 20 disputes “could” occur in the future, Compl. ¶¶ 118, 123, 131, 159, and that an
 ambiguous “pandora’s box of corporate liabilities” has been opened, Resp. at 7.

1 These allegations are insufficient to plead a justiciable controversy. *Lewis Cnty. v.*
 2 *State*, 178 Wash. App. 431, 438, 315 P.3d 550 (2013) (affirming dismissal, finding
 3 allegations of a “hypothetical or speculative dispute” “simply cannot show that the
 4 first justiciability element is met.”); *Diversified Indus. Dev. Corp. v. Ripley*, 82
 5 Wash. 2d 811, 815, 514 P.2d 137 (1973) (dispute must be “more discernible than an
 6 unpredictable contingency”).² Plaintiff does not address Defendants’ authorities.

7 Nor does Plaintiff identify a rare “major public importance” that would justify
 8 excusing the lack of justiciable controversy. Mot. at 8-9. The Complaint does not
 9 allege, and Defendants do not argue, that the Initiatives were the result of “bowing”
 10 to “pressure” from Blackrock, Vanguard, or any other major shareholder. Resp. at
 11 2. Defendants merely argue that these shareholders likely support the Company’s
 12 position over Plaintiff’s on this issue. Regardless, the media debate regarding the
 13 pushback against so-called “woke” corporate culture does not rise to the same level
 14 of importance as eligibility for public office, free elections, the constitutionality of
 15

16 ² Plaintiff’s discussion of “contingent” and “unliquidated” claims is inapplicable.
 17 Resp. at 6-8. Those terms are unique to the Bankruptcy Code and have no relevance
 18 here. *Id.* at 7 n.13 & 14 (citing bankruptcy cases). Regardless, courts are reluctant to
 19 allow a derivative action to proceed based upon alleged predicate wrongdoing that
 20 has not yet been adjudicated. ECF No. 19 at 15. Plaintiff does not distinguish the
 Company’s argument or authorities as to the absence of actual, as opposed to
 potential, corporate trauma in this action. *Id.* at 14. For the same reason, Plaintiff’s
 reliance on *Kandell ex rel. FXCM, Inc. v. Niv*, 2017 WL 4334149, at *6-8 (Del. Ch.
 Sept. 29, 2017), is misplaced since it involved a “catastrophic” market volatility
 event that caused the company ~\$200 million in losses immediately.

1 excise taxes, or providing service to homeless children. Mot. at 9.

2 **II. The Initiatives are Quintessential Business Decisions Protected by the**
Business Judgment Rule, Requiring Dismissal of Counts V-VII

3 Defendants do not argue that an illegal corporate act is protected by the
4 business judgment rule. Resp. at 11. Defendants argue that if a corporate act is legal,
5 plausibly legal, or undetermined as to its legality, the corporate act is protected by
6 the business judgment rule. Otherwise, derivative actions, disfavored lawsuits that
7 should only be maintained in exceptional circumstances, would always survive Rule
8 12(b)(6) and 23.1 motions to dismiss if the plaintiff simply alleges illegality.
9 Plaintiff's "say so" is not enough. Absent clear illegality, a corporate act is protected
10 by the business judgment rule where (1) "the transaction is within the power of the
11 corporation and the authority of management, and (2) there is a reasonable basis to
12 indicate that the transaction was made in good faith." *Scott v. Trans-Sys., Inc.*, 148
13 Wash. 2d 701, 709, 64 P.3d 1 (2003).

14 Here, there are no well-pled allegations that suggest the Individual Defendants
15 acted "so far beyond the bounds of reasonable judgment that it seems essentially
16 inexplicable on any ground other than bad faith," *In re J.P. Stevens & Co., Inc.*
17 *S'holders Litig.*, 542 A.2d 770, 780–81 (Del. Ch. 1988), which is necessary to
18 overcome the "powerful presumption" of the business judgment rule, *Cede & Co. v.*
19 *Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). Plaintiff's unsupported legal
20 theories and general disagreement with the Initiatives are not enough to meet this

1 extraordinary standard. The “weighing of” social, political, or legal risks associated
 2 with a decision to act (or not act) “by disinterested fiduciaries does not evidence
 3 potential lack of due care, let alone bad faith.” *Simeone v. Walt Disney Co.*, 2023
 4 WL 4208481, at *12-13 (Del. Ch. June 27, 2023). Counts V and VI for breaches of
 5 fiduciary duty should be dismissed.

6 Plaintiff’s claim that the Board engaged in an *ultra vires* act, Count VII, is
 7 premised on the act’s illegality. Since Plaintiff’s “say so” is insufficient to plead
 8 illegality, *Twombly* at 555, Plaintiff also fails to plead an *ultra vires* act. Starbucks
 9 and its management have the power and authority to implement policies relating to
 10 the hiring and promotion of its employees and contracting with certain suppliers.
 11 *Hartstene Pointe Maint. Ass’n v. Diehl*, which the Response misreads (Resp. at 12-
 12 13), states that there is a distinction between “a challenge to the authority of the
 13 corporation,” and a challenge “to the method of exercising it[,]” with the doctrine of
 14 *ultra vires* not applying to the latter. 95 Wash. App. 339, 345, 979 P.2d 854 (1999).
 15 The Complaint takes issue with the “manner of executing such authority.” *Id.* at 345.
 16 Such disagreement does not render the Initiatives *ultra vires*.

17 **III. The Complaint Fails to Plead Defendants’ Participation in the Adoption
 or Implementation of the Initiatives**

18 The Complaint does not specify what, if any, involvement the Individual
 19 Defendants had in the adoption or implementation of the Initiatives, Mot. at 14-16,
 20 which is fatal to its claims. The Response argues that a “fair reading” of the

1 Complaint fills these gaps, but in doing so, disregards Supreme Court precedent that
 2 “bare,” “conclusory,” and “speculative” allegations, *Twombly*, 550 U.S. at 555–57,
 3 are “not entitled to the assumption of truth,” *Iqbal*, 556 U.S. at 664. Resp. at 18-19.
 4 Plaintiff does not address the Individual Defendants’ authorities. Regardless,
 5 Plaintiff concedes the Complaint’s insufficiency in this regard by offering to amend.
 6 *Id.* at 19. But even if given an opportunity to do so, Plaintiff would be unable to
 7 plead anything more than conclusory and speculative allegations.

8 **IV. The Complaint Fails to Plead Non-Exculpated Claims Against the
 Directors**

9 Starbucks articles of incorporation limit the liability of its directors for
 10 monetary damages except for instances of “intentional misconduct” or “knowing
 11 violation[s] of law.” Mot. at 17 (citing RCW 23B.08.320). Plaintiff fails to plead or
 12 argue in its Response any particularized facts on a director-by-director basis showing
 13 their involvement in the adoption and implementation of the Initiatives, as required.
 14 *Id.* at 18-19 (citing authority). Instead, Plaintiff presupposes as a matter of law that
 15 the Initiatives are illegal and alleges in conclusory fashion that the directors as a
 16 group “knew or should have known” of the illegality. Resp. at 15 (citing Compl.
 17 ¶ 127). Just because Plaintiff’s Demand claimed the Initiatives are illegal, does not
 18 mean it is true or that the directors knew it when they refused the Demand,

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1 particularly after the Board's investigation. Ex. 1.³ The Board was under no duty to
 2 accept Plaintiff's legal conclusions as incontrovertibly true.

3 **CONCLUSION**

4 Counts I-IV should be dismissed with prejudice because Plaintiff cannot cure
 5 the fact that it lacks standing and a justiciable controversy to bring a declaratory
 6 judgment action. Counts V-VII should be dismissed because the Complaint fails to
 7 plead (i) the Initiatives were made in bad faith, (ii) the participation of the Individual
 8 Defendants in creating and implementing the Initiatives, and (iii) any claim not
 9 exculpated by Starbucks articles of incorporation. Count VIII must be dismissed as
 10 no predicate claim remains. *See Markoff v. Puget Sound Energy, Inc.*, 9 Wash. App.
 11 2d 833, 851, 447 P.3d 577 (2019) (where the underlying substantive claims are
 12 dismissed, plaintiff "no longer ha[s] a right that could be vindicated or protected by
 13 the injunction" as "an injunction is a remedy, not an independent cause of action.").

14

15 ³ Plaintiff's authority, nearly all of which deal with direct or indirect government
 16 actors and not a private actor like Starbucks, Resp. at 15 n.45, does not show that
 17 Starbucks Initiatives are illegal. *See Taxman v. Bd. of Educ. of Twp. of Piscataway*,
 18 91 F.3d 1547, 1558 (3d Cir. 1996) (public school board); *Grutter v. Bollinger*, 539
 19 U.S. 306, 343 (2003) (public university); *Alexander v. City of Milwaukee*, 474 F.3d
 20 437, 439-46 (7th Cir. 2007) (police department); *Lomack v. City of Newark*, 463
 F.3d 303, 307-10 (3d Cir. 2006) (fire department). *See* ECF No. 29 at 9 n.3 &10 n.4
 for a discussion regarding the inapplicability of *Students for Fair Admissions, Inc.*
v. Presidents and Fellows of Harvard College and *Students for Fair Admissions, Inc.*
v. University of North Carolina, 2023 WL 4239254 (U.S. June 29, 2023), to the facts
 alleged here.

1 Dated: July 13, 2023

Respectfully submitted,

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11 *Counsel for Nominal Defendant*
12 *Starbucks Corporation and the Individual*
13 *Defendants*

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1 **CERTIFICATE OF SERVICE**

2 I certify that on this 13th day of July 2023, I caused a copy of the foregoing
3 Individual Defendants' Reply in Support of Motion to Dismiss Complaint be
4 electronically filed with the Clerk of the Court using the CM/ECF system, which in
5 turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the
6 case who are registered users of the CM/ECF system. The NEF for the foregoing
7 specifically identifies recipients of electronic notice.

8 Dated: July 13, 2023

9 s/ Gregory L. Watts
10 Gregory L. Watts, WSBA #43995

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